Supreme Court, U.S.
FILED

08-86 JUL 2 - 2008

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

IVAN DJUKIC,

Petitioner,

v.

MICHELLE TURNER,

Respondent.

On Petition for Writ of Certiorari to the Eighth District Court of Appeals for Cuyahoga County, Ohio

PETITION FOR WRIT OF CERTIORARI

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July 16, 2008

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QUESTIONS PRESENTED

1. Whether an award of zero punitive damages violates due process.

2. Whether a punitive damages penalty should be reasonably predictable in its severity.

3. Whether the trial court violated a tort plaintiff's due process rights when it permitted an expert witness to testify when the tort defendant had not properly identified said witness in accordance with local rules mandating same.

4. Whether the trial court violated a tort plaintiff's due process rights when it refused to permit the tort plaintiff to present expert witness testimony as to an opinion which had not been presented in that expert witness' report–in accordance with local rules mandating same.

5. Whether the trial court violated a tort plaintiff's due process rights when it failed to take judicial notice of a certified copy of a court docket showing that defense counsel had previously personally served as his testifying witness's attorney and not admitting same into evidence.

PARTIES TO THE PROCEEDING

Petitioner

Ivan Djukic is an individual with no corporate affiliations.

Respondent

Michelle Turner is an individual.

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Ivan Djukic respectfully petitions for writ of certiorari to review the judgment of the Eighth District for the State of Ohio, Cuyahoga County, in this case.

OPINIONS BELOW

The Supreme Court for the State of Ohio did not accept jurisdiction in this case. (App., *infra* B). Therefore, this decision is unreported. The decision of the Court of Appeals for the Eighth District for the State of Ohio, Cuyahoga County, is also unreported. (App., *infra* A).

JURISDICTION

The Supreme Court for the State of Ohio entered its judgment refusing jurisdiction on February 6, 2008. (App., *infra* B). A motion for reconsideration was denied on April 9, 2008. (App., *infra* C). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Factual and Procedural History

On July 16, 2001 at approximately 4:00 AM, the defendant with a blood alcohol level of .133 rear ended the plaintiff's vehicle at 70 mph on interstate 77 South in Independence, Ohio. Plaintiff had $58,000.00 in medical bills as a result of the injuries received in the accident. Plaintiff filed a lawsuit asking for both compensatory and punitive damages. Defendant admitted negligence and intoxication and the trial went forward on the issue of the extent and nature of plaintiff's injuries and punitive damages. Trial concluded on September 11, 2006 with a verdict in favor of plaintiff in the sum of $19,000.00 in compensatory damages, and in the sum of zero dollars in punitive damages. Plaintiff objected to several rulings of the Trial Court. A proper Notice of Appeal was filed on October 10, 2006.

On October 7, 2005, thirteen days prior to the originally scheduled trial, defense counsel sent plaintiff's counsel a Notice of deposition for Michael Eppig, M.D. Dr. Eppig was not listed as a witness for the defense prior to October 7, 2005 and no expert report from Dr. Eppig, pursuant to Local Rule 21.1 had been exchanged.

On October 10, 2005 plaintiff's counsel advised defense counsel that he objected to the deposition of Dr. Eppig for the above noted reasons. On Thursday, October 13, 2005, defense counsel filed Defendant's Motion to Compel. On Friday, October 14, 2005 at 8:30 AM defense counsel called plaintiff's counsel at home from the chambers of the Honorable Eileen A. Gallagher who informed counsel that she was granting the Motion to Compel. Her Honor acknowledged that Dr. Eppig was not listed as a defense witness and that no expert report had been exchanged but stated the defense could call Dr. Eppig as a fact witness. Counsel requested seven days to respond pursuant to Civil Rule 16 noting that it was a Jewish Holiday and that he had not even seen the Motion to Compel. Her Honor nonetheless granted the Motion and stated that she didn't care whether counsel attended the deposition or not, but that she was allowing same and would allow it at trial.

On October 14, 2005 plaintiff filed a Motion In Limine regarding the Court's ruling regarding the deposition and a second Motion In Limine after Dr. Eppig refused proper cross examination during the deposition. At trial both Motions were renewed and both overruled.

At trial in plaintiff's opening statement, the jury was told that defense counsel had personally represented Dr. Eppig in a previous lawsuit (Tr p.24). Counsel had a certified journal entry proving the above, but counsel's offer of said entry at trial was rejected by the Court. (Tr 269). Defense counsel subsequently commented upon the fact that no evidence was submitted at trial to prove counsel's

previous assertion in opening statement. (Tr 312, 313). Plaintiff's counsel believes said entry showed at least a possible bias or prejudice and possible conflict of interest and that judicial notice of same was required.

Lastly, counsel called Dr. Ernest Marsolais as an expert witness. All of Dr. Marsolais' records and reports had been exchanged with defense counsel. Dr. Marsolais was listed as a possible witness by both the plaintiff and defendant. All of Dr. Marsolais' records started with a history of the above noted accident. Dr. Marsolais had however, retired briefly and then restarted his practice. Defense counsel objected to testifying as to proximate cause since there was no specific report in which he overtly stated that the injuries he described were directly related to the history he noted.

Prior to Dr. Marsolais' testifying he submitted a note to the Court indicating proximate cause and indicating that plaintiff's counsel had requested a more exact medical report, but that due to his office's error, and his brief retirement, none was sent. (Tr 184). Counsel for the plaintiff pointed out that Dr. Marsolais was listed as a defense witness; that all records had been exchanged; that there was no surprise; that a short continuance could be had to allow the defense to depose Dr. Marsolais if surprise was alleged and that a good faith effort to obtain a more exact report had been made pursuant to 21.1(C). The Court, nonetheless, allowed the doctor to testify, but denied the ability to question as to proximate cause. (Tr 191, 203, 324).

B. How the Federal Questions were Raised.

Djukic's counsel did not raise any objection whatsoever to the jury's judgment with respect to punitive damages. Due to the fact that this issue raises due process claims, such issue should not be barred by counsel's failure to raise same.

As to the remainder of the issues before this Court, Djukic's counsel did raise timely objections or otherwise raise the remaining issues (See Appendices E, F and G); however, at no time did Djukic's counsel contend that the trial court's actions violated any federal statute or right. Likewise, since the trial court violated Djukic's due process rights, such issues should not be barred for the failure of trial counsel to timely raise same.

REASONS FOR GRANTING THE PETITION

I. The Ohio courts violated Djukic's right to due process when the trial court granted punitive damages to Djukic, yet made no monetary award of same.

On several occasions, this Court has been faced with issues with respect to the awarding of punitive damages. In the past, this Court has been asked to determine whether an unusually large award of punitive damages violates due process. Most recently, this Court was asked whether the award of punitive damages arising out of the Exxon Valdez accident of 1989 was excessive.

This Court has never been asked to determine whether a jury has violated a tort plaintiff's rights when it has awarded to the plaintiff no punitive damages or an inadequate amount of same.

In this Court's most recent pronouncement in *Exxon Shipping Co. v. Baker*, 554 U.S. ___(2008), this Court was asked to determine whether the amount of punitive damages was excessive in accordance with maritime law. As this Court well knows, it did not make that decision in accordance with maritime law. Instead, this Court decided several other issues relating to punitive damages. This Court even discussed, but did not decide, whether punitive damage awards for similar circumstances should be similar.

In this Court's decision in *Exxon*, this Court went through an extensive discussion of the history of punitive damages. As such, Djukic will not endeavor to go through an entire history of same. Instead, Djukic will confine his discussion to why and how his due process rights were violated by the awarding of zero punitive damages.

Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus., Inc. v. Leatherman*, 532 U.S. 424, 432 (2001). Punitive damages "have been described as 'quasi-criminal' and 'operate as "private fines"' intended to punish the defendant and to deter future wrongdoing." *Id.* Punitive damages are similar to civil penalties. *Tull v. United States*, 481 U.S. 412 422, n. 7 (1987).

Historically speaking, punitive damages have been permitted in order to punish a defendant or to make an example of same. A third justification was in order to "compensate for intangible injuries * * *." *Exxon, supra* at 18. In *Exxon*, this Court determined that ultimately, awards of punitive damages have been aimed at retribution and deterring harmful conduct. *Id.* at 19.

Ohio Revised Code Section R.C. 2315.21(C) states that a plaintiff may not recover punitive damages from a defendant in a tort action unless both of the following apply: "(1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud *** and (2) The trier of fact has returned a verdict or has made a determination *** of the total compensatory damages recoverable by the plaintiff from that defendant." The Code further provides that in the vast majority of tort cases, a tort plaintiff may only receive as punitive damages two times the amount that the jury awards in compensatory damages.

In the instant case, punitive damages were permissible in the event that the jury found that the defendant was intoxicated at the time that she caused the accident. The jury so found.

In *Exxon*, this Court extensively discussed the inequality of how punitive damages are awarded in the United States judicial system. For example, this Court was appalled at the wide deviation in the amounts of punitive damages granted. "Even to those of us unsophisticated in statistics, the thrust of these figures is clear: the spread is great, and the outlier

cases subject defendants to punitive damages that dwarf the corresponding compensatories." *Id.* at 26. "We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances." *Id.* at 27.

This Court further addressed punitive damages in a similar manner as that of criminal sentencing. "'[P]unitive damages which are also among the interests of punishment and deterrence, which are also among the interests advanced by the criminal law.'" *Id.* at 31, citing *Browning-Ferris Industries*, 492 U.S. 257, 275 (1989). "The common sense of justice surely would bar penalties that reasonable people would think excessive for the harm caused in the circumstances." *Id.* at 29.

This Court allowed that the broad range of punitive damage awards would be acceptable if they resulted from "judges' and juries' refining their judgments to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, while producing fairly consistent results in cases with similar facts." *Exxon*, supra at 27. However, this Court found that such was not happening. In fact, this Court cited anecdotal evidence to that effect. "One of our leading cases on punitive damages, with a $4 million verdict by an Alabama jury, noted that a second Alabama case with strikingly similar facts produced 'a comparable amount of compensatory damages' but 'no punitive damages at all.' See *Gore*, 517 U.S., at 565, n. 8." *Id.* at 27.

This is the very problem here–except reversed. In the past this Court was faced with deciding whether a

certain punitive damage award violated due process when the amount of the award was excessive. Here, Djukic is asking this Court to accept *certiorari* in order to determine that his due process rights were violated when the jury determined that he was entitled to an award of punitive damages, yet awarded him no monetary compensation. Such an outcome is equally violative of due process.

In *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), this Court announced due process standards that *every* punitive damage award must pass. Courts must consider:

(1) the degree of reprehensibility of the defendant's misconduct,
(2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and
(3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Campbell, supra. Further, this Court determined that such a review by the trial court is *de novo*.

Djukic now asks that this Court order that trial and appellate courts apply the reviewing standards enunciated in *Campbell* to *all* cases involving punitive damages–not just the ones in which a party claims that the award was excessive. Juries are unpredictable. They do not assess punitive damages in any relation to the actual harm caused. On one hand, juries have been known to give windfalls

awards. On the other, juries have awarded little or no punitive damages for essentially the same conduct.

In the instant matter, the jury found that Turner's acts (driving drunk) were egregious; however the jury chose not to award any punitive damages to Djukic. Applying this Court's pronouncement in *Campbell* to this matter, the trial (and appellate) court would first look to the degree of reprehensibility of the defendant's misconduct.

The defendant, a bar maid, was driving drunk in the wee hours of the morning on a highway at a high rate of speed. She ran into the back of Djukic's car.

Second, the court should have looked at the disparity between the actual harm suffered by Djukic and the punitive damages awarded. After hearing extensive testimony as to the injuries suffered by Djukic to his neck and back, the jury awarded Djukic the sum of $19,000.00 in compensatory damages. The jury also found that an award of punitive damages was appropriate, yet they provided no attendant compensation to Djukic for same.

Third, the court should have considered the difference between the punitive damages awarded by Djukic's jury (zero) and the civil penalties authorized or imposed in comparable cases. The trial court should have reviewed recent decisions with respect to personal injury cases involving drunk defendants. It is doubtful that the trial judge would have uncovered a pattern of awarding of no damages.

If the trial court would have applied the *Campbell* decision to Djukic, the trial judge would have had two options: (1) order the jury to re-convene to determine an appropriate award of punitive damages, or (2) the trial judge could have ordered an award of same herself. Not having done either, the trial court violated Djukic's due process rights.

This Court should accept *certiorari* in order to clarify to all courts that this Court's decision in *Campbell* is mandatory in all cases in which punitive damages are awarded–not just in cases in which one party claims that the award is excessive in nature.

Alternatively, this Court should accept *certiorari* in order to apply this Court's decision in *Exxon* to this case.

Ultimately, in this Court's third paragraph of its syllabus, this Court decided to "peg punitive damages awards to compensatory damages using a ratio or maximum multiple." *Exxon.* After much discussion, this Court settled on a 1:1 ration as "a fair upper limit in * * * maritime cases." *Id.* This Court arrived at same in the *Exxon* case after deciding that there were "no earmarks of exceptional blameworthiness." *Id.*

In the instant matter, there were "exceptional earmarks of blameworthiness." Turner was drunk and was operating a motor vehicle at a high rate of speed in the early morning hours. Applying this Court's decision in *Exxon* to this matter, Djukic would be *entitled* to at least an award of punitive damages in a ratio of 1:1. That is, Djukic, as a matter of law, would receive at least $19,000.00 in punitive damages.

Once again, Djukic requests that this Court grant *certiorari* in order to apply its principles of fairness to the punitive damages awarded to Djukic. Djukic's due process rights as guaranteed by the fifth and fourteenth amendments have been violated by the trial court.

II. The Ohio courts violated Djukic's right to due process when the trial court permitted an expert witness to testify in violation of local rule and when the trial court improperly refused to take judicial notice of a certified court document.

Counsel for the defense received Court permission to take a medical expert deposition (of Dr. Eppig) thirteen days prior to trial without ever listing the expert as a witness or exchanging a medical report pursuant to Cuyahoga County Local Rule 21.1, which states as follows:

> "Since Ohio Civil Rule 16 authorizes the Court to require counsel to exchange the reports of medical witnesses expected to be called by each party, each counsel shall exchange with all other counsels written reports of medical and non-party witnesses expected to testify in advance of trial A party may not call a non-party expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel...."

There is no question that Dr. Eppig was not listed as a lay or expert witness. There is no dispute that he did not write, nor was there furnished to counsel, a

medical report. Ohio courts have found that the excluding of testimony of an expert whose proponent had not named and whose report had not been filed prior to established deadline, is not an abuse of discretion by the Court. See for example, *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged,* 15 Ohio St. 3d 44 (1984).

On October 7, 2005, just thirteen days before trial defense counsel noticed Djukic of the deposition of Dr. Eppig. On that date, Djukic's counsel advised defense counsel of his objections as noted above. On October 13, 2005, defense counsel filed a Motion to Compel. On October 14, 2005, at 8:30 AM defense counsel called Djukic's counsel at home from the chambers of the Honorable Eileen A. Gallagher, who informed counsel that she was granting the Motion. Her Honor acknowledged that Dr. Eppig was not listed as a defense witness and that no expert report had been filed but stated the defense could call Dr. Eppig as a fact witness.

Djukic's trial counsel requested seven days to respond, pursuant to Ohio Civil Rule 16, noting that it was the Jewish Holiday of Yom Kippur and that counsel had not even seen the Motion to Compel that was filed the previous day. Nonetheless, the Judge granted the Motion stating that she didn't care whether plaintiffs counsel attended the deposition or not but that she was allowing same and would allow same at trial.

On October 14, 2005, Djukic filed a Motion In Limine regarding the deposition and a second Motion In Limine after Dr. Eppig refused proper cross-

examination during his deposition. At trial both Motions were renewed and overruled.

On the 18th day of October, 2005, the defendant took the video discovery deposition of Michael Eppig, M.D. and subsequently played same for the jury. Subsequent to the doctor being examined by the defense, plaintiff pursuant to Rule attempted to cross examine him. Unfortunately, the doctor, acting as Judge, decided what questions he wanted or did not want to answer denying Djukic the right to examine and cross-examination.

The doctor's fact testimony was in essence that he saw nothing wrong with Djukic's back. Counsel for Djukic attempted to show the doctor records from the emergency room, MRI's and other physician's records, which clearly and unequivocally showed several cervical and lumbar herniations, but the doctor refused to look at the exhibits or comment upon them or explain why his diagnosis differed from same. (Tr.39).

On page 44 line 15, of Dr. Eppig's deposition, counsel asked the doctor to look at the emergency room records and to compare his findings with that of the emergency room doctors. The doctor refused. Counsel then told the doctor, starting at line 23, that he had no choice but to answer the questions since there was no objection by the defense, but he continued to refuse to answer. The doctor, claiming to be only a fact witness, insisted he would only testify to what he personally did or thought.

Ohio Civil Rule 30 allows cross-examination of a witness on deposition as permitted at trial. The rule

provides that evidence shall be taken subject to objections. There were no objections by defense counsel, only by the doctor. The testimony of a witness is to be given subject to the right to object to admissibility at trial. *Bevan v. Krieger,* 289 US 459 (1933).

The concept of accepting testimony subject to objection is particularly significant under the Ohio Rules of Civil Procedure (modeled after the federal rules). Ohio Civil Rule 26(B)(1) allows discovery of information which is inadmissible at trial "if the information sought appears reasonably calculated to lead to discovery of admissible evidence". Obviously, contrasting the observations, conclusions, or testimony of Dr. Eppig with the observations, conclusions and testimony of other physicians is proper cross-examinations. To ask the doctor to explain how the MRI's taken of plaintiff s back that show several herniations can be consistent with his statement that he saw nothing, is proper cross-examination. To contrast the opinions of several other doctors with Dr. Eppig's observations is proper cross-examination. Nonetheless, the doctor refused stating he was only a fact witness and he would only comment on <u>his</u> version of the facts.

Cuyahoga County Local Rule 13 requires a witness to answer all questions unless privileged or directed not to by the Court. The questions asked were not privileged or forbidden by the Court.

On Page 60 of the deposition at line 7, Dr. Eppig stated he found nothing wrong with the plaintiff's spine. Dr. Eppig, claiming to only have to give his

observation as a fact witness without having to undergo cross-examination of the observations conveniently insulated his opinion from that of all other medical witnesses at trial. Civil Rule 32 (C) makes it clear that "a party does not make a person his own witness for any purpose by taking his deposition". Civil Rule 27 makes it clear that a deposition can only be used when taken with the right and opportunity of cross examination. Since the doctor refused to answer questions or look at exhibits on cross-examination, the deposition was not admissible.

Since the defense failed to submit an expert report or list the doctor as a witness, the Judge allowed the doctor to be deposed as a fact witness. The fact that the defense had to limit its inquiry on its deposition does not limit the scope of Djukic's inquiry. Clearly, such actions of the trial court violated Djukic's due process.

Questions can be asked on cross-examination on any subject inquired into by the defense or that could have been inquired into by the defense. Djukic's inquiry should not be limited by the defense's mistakes. The doctor, as noted previously, was not deposed strictly as a witness exclusively for the defense but as a deponent who was requested to answer all questions subject to objection and subsequent court rulings. Since Dr. Eppig would not compare, contrast or explain his observations with the observations of others, there was no way to impeach his testimony. Ohio Evid. R. 616(C) states: "specific contradiction facts contradicting a witness's testimony may be shown for the purpose of impeaching the witness's testimony." Dr. Eppig refused to be

questioned or impeached by the testimony or tests of others. The MRI's and opinions and medical records that Dr. Eppig was asked to comment upon or explain, were properly admitted at trial yet he refused to answer questions on same.

The above becomes even more relevant when Djukic's counsel discovered that defense counsel had personally served as Dr. Eppig's lawyer on another matter. Counsel informed the jury of this fact. (Tr. 24). Counsel had a certified copy of the journal entry and offered same as an exhibit (Tr. 269). The Court refused to take judicial notice of the certified journal entry and denied its admission. Defense counsel (Tr 312, 313) subsequently commented to the jury upon the fact that no evidence was admitted at trial to prove plaintiffs assertion in opening statement. Counsel believes that the journal entry was a proper exhibit showing at least a possible bias or prejudice of the witness and probable conflict of interest that should have been disclosed.

In *Kramer v. Rowse,* 2nd Dist. Case No. 21311, 2006-Ohio 2336, 2006 WL 1284400, the Court committed reversible error by excluding cross-examination of Appellee's medical witness regarding his relationship with Allstate Insurance Company. The Court held that "there was a reasonable possibility that the verdict would have been different had the jury been informed of the doctor's relationship with Allstate. The Court of Appeals held the exclusion of this testimony, which was relevant to potential bias, was prejudicial. What could be more relevant to bias or prejudice than that the testifying witness was previously personally represented by defense counsel? By not only failing to take judicial notice of a certified

Court document, the Court excluded the possible bias or prejudice of the witness from the jury's consideration.

This Court should take notice that the Ohio rule dealing with judicial notice (Ohio Evid. R. 201) and the federal rule (Fed. R. Evid. 201) are essentially identical. Faced with a certified copy of a document evidencing the prior relationship between the doctor and defense counsel, the evidence rule mandated that the trial court take judicial notice of same and so inform the jury.

III. The Ohio courts violated Djukic's right to due process when the trial court refused to permit Djukic to ask relevant questions of an expert witness.

Lastly, Djukic called Ernest Marsolais, M.D., as an expert witness (Tr 184). Dr. Marsolais' records and reports had been exchanged with defense counsel prior to trial, and Dr. Marsolais was listed as a possible witness by **both** the plaintiff and defense. All of Dr. Marsolais' records started with a history of the accident in question. Dr. Marsolais had briefly retired from his practice and then had reinstated same prior to trial. Defense counsel made an oral Motion In Limine to exclude Dr. Marsolais' testimony, arguing that he did not say in his records that the injuries he was treating were directly and proximately related to above noted history, in his records.

Prior to Dr. Marsolais' testifying he submitted a note to the Court indicating proximate cause and further indicating that Djukic's counsel had requested

a more exact medical report but that due to his office's error, and his retirement, none was sent. (See proffer Tr. 191). Djukic pointed out that all medical records were exchanged; Dr. Marsolais was listed as a defense witness; that there was no surprise; that a short couple hour continuance could be given if the defense needed to depose Dr. Marsolais; and that a good faith effort to obtain a more exact report had been made by Djukic pursuant to Cuyahoga County Local Rule 21.1(C). The trial court, nonetheless, allowed the doctor to testify but denied Djukic from asking any questions as to the proximate cause of the injuries and the accident in question.

This is the reverse of the issue discussed above in section II. Here, the trial court violated Djukic's due process rights when the trial court refused to permit Djukic to present relevant evidence which went to the meat of the case–then proximate cause of Djukic's injuries.

Dr. Marsolais had provided all of his records and he had submitted a report. Further, the defendant had listed Dr. Marsolais as one of her potential expert witnesses.

It was clearly error for the trial court to refuse to permit Djukic to fully examine Dr. Marsolais as to all of the relevant opinions of Dr. Marsolais. All parties knew Dr. Marsolais' opinions, Djukic's due process rights were violated.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

July 16, 2008

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APPENDIX

APPENDIX A

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT

C.A. NO. 88849

[Filed September 10, 2007]

STATE OF OHIO
COUNTY OF CUYAHOGA

IVAN DJUKIC
Appellant

v.

MICHELLE TURNER
Appellee

APPEAL FROM THE JUDGMENT ENTERED
IN THE COURT OF COMMON PLEAS
COUNTY OF CUYAHOGA, OHIO
CASE NO. CV-504827

JOURNAL ENTRY AND OPINION

Dated: August 30, 2007

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N.B. This entry is an announcement of the court's decision See AppR. 22(B), 22(D) and 26.(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

Appellant Ivan Djukic appeals the trial court's decision overruling his motion in limine and objections, to the trial testimony of Michael Eppig, M.D. Djukic assigns the following errors for our review:

> **"I. The trial court erred in overruling plaintiffs motion in limine and objections at trial to the testimony of Michael Eppig, M.D, who was not listed as a defense witness, who had not submitted an expert's report pursuant to Local Rule 21.1, who refused proper cross-examination and for not allowing plaintiff the seven days required by Civil Rule 16 to respond to defendant's motion to compel said doctor's testimony."**
> **"II. The Court erred by not taking judicial notice of a certified copy of the court docket showing that defense counsel had previously personally served as his testifying witness's attorney and not admitting same into evidence."**
> **"IIL The Court erred in not allowing Dr. Marsolais to give his opinion on the proximate cause of plaintiffs injuries."**

Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

On July 16, 2001, appellee Michelle Turner struck the rear-end of Djukic's 1999. Ford truck as Djukic traveled along Interstate 77 South in the City of

Independence, Ohio. On July 3, 2003, Djukic filed suit against Turner alleging personal injuries sustained as a result of the collision. The complaint also alleged that Turner, at the time of the collision, operated her automobile at a dangerous and illegal speed. The complaint further alleged that Turner's blood alcohol content was in excess of .10% at the time of the accident. Turner conceded the issue of negligence, and the case proceeded to trial solely on the issues of damages and proximate cause, as well as punitive damages.

On October 7, 2005, approximately two weeks prior to the originally scheduled trial date, Turner notified Djukic of her intent to depose Michael Eppig, M.D., one of Djukic's treating physicians. Djukic advised Turner that he objected to the deposition because Dr. Eppig was not listed as a witness for the defense prior to October 7, 2005, and had not submitted an expert's report pursuant to Local Rule 21.1.

On October 13, 2005, Turner filed a motion to compel Dr. Eppig's deposition. The following day, the trial court acknowledged that Dr. Eppig was not listed as a defense witness and had not submitted an expert's report. The trial court advised Djukic that it intended to grant Turner's motion to compel Dr. Eppig's deposition. However, the trial court advised Djukic that it was granting Turner's motion to compel Dr. Eppig's deposition as a fact witness, and not as an expert witness

In response to the trial court's ruling, Djukic filed a motion in limine asking to exclude Dr. Eppig from testifying as an expert. After Dr. Eppig was deposed,

Djukic filed a second motion in limine to exclude the testimony. In the second motion, Djukic alleged that Dr. Eppig refused proper cross-examination during the deposition. The trial court overruled the second motion in limine.

At trial, Djukic renewed both motions in limine, which the trial court overruled. Djukic also requested that the trial court take judicial notice that Turner's defense counsel had represented Dr. Eppig in a previous lawsuit, and Djukic offered a certified journal entry to prove his assertions. The trial court rejected the offer of the journal entry and declined to take judicial notice.

At trial, Djukic called Dr. Ernest Marsolais as an expert witness. Turner objected to Dr. Marsolais testifying as to the proximate cause of Djukic's injuries. Turner argued that the expert's report Dr. Marsolais submitted never indicated that the injuries Djukic sustained were related to the history he noted. Prior to testifying, Dr. Marsolais submitted a note to the trial court indicating that Djukic's counsel had requested a more exact report, but due to Dr. Marsolais' office's error and his brief retirement, none was included. The trial court ruled that Dr. Marsolais could not testify to the proximate cause of Djukic's injuries.

At the conclusion of the trial, the jury returned a verdict in Djukic's favor. The jury awarded Djukic $19,000 in compensatory damages, but did not award punitive damages.

Expert Witness

In his first assigned error, Djukic argues the trial court erred when it overruled his motion in limine to exclude the testimony of Michael Eppig, M.D., who had not submitted an expert's report as required by Local Rule 21.1. We disagree.

Our standard of review on the admission of evidence is whether the trial court abused its discretion.[1] An "abuse of discretion" means more than an error of law or judgment. Rather, an abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable.[2]

The portions of Local Rule 21.1 at issue here are sections (B) and (C), which state:

> "(B) A party may not call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. *** The report of an expert must reflect his opinions as to each issue on which the expert will testify. An expert will not be permitted to testify or provide opinions on issues not raised in his report.
> (C)All experts must submit reports. If a party is unable to obtain a written report from an

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[1] *Barnett v. Sexten*, 10th Dist No. 05AP-871, 2006-Ohio-2271, citing *Dunkelberger v. Hay*, .10th Dist. No. 04AP-773, 2005-Ohio-3102.

[2] *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, citing *State v. Adams* (1980), 62 Ohio St.2d 151.

> expert, counsel for the party must demonstrate that a good faith effort was made to obtain the report and must advise the court and opposing counsel of the name and address of the expert, the subject of the expert's expertise together with his qualifications and a detailed summary of his testimony. In the event the expert witness is a treating physician, the Court shall have the discretion to determine whether the hospital and/or office records of that physician1s treatment which have been produced satisfy the requirements of a written report. The Court shall have the power to exclude testimony of the expert if good cause is not demonstrated ***."

One of the purposes of the Rules of Civil Procedure is to eliminate surprise.[3] This is accomplished by way of a discovery procedure which mandates a free flow of accessible information between the parties upon request, and which imposes sanctions for failure to timely respond to reasonable inquiries.[4] Loc.R.21.1 effectuates the purpose of eliminating surprise by regulating in a comprehensive manner discovery relating to expert witnesses. The purpose of the rule is to eliminate surprise, with the existence and effect of prejudice resulting from noncompliance being the primary concern.[5]

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[3] *Jones v. Murphy* (1984), 12 Ohio St.3d 84, 86.

[4] Id.

[5] *Nwabara v. Willacy* (1999), 135 Ohio App.3d 120, 133, citing *David v. Schwarzwald, Robiner, Wolf & Rock C'o., L.P.A.* (1992), 79 Ohio App.3d 786, 795.

In the instant case, the trial court overruled Djukic's motion in limine and allowed the deposition of Dr. Eppig to go forward as a fact witness. This meant that Dr. Eppig was generally limited to testifying only to facts and leaving to the jury the job to make the necessary and natural deductions from those facts.

The Ohio Supreme Court and this court have consistently held that the court has discretion to determine whether there has been a violation of Local Rule 21.1 and how to remedy that violation.[6]

Here, the trial court's remedy restricting Dr. Eppig's testimony to that of a fact witness was appropriate. We have previously held that the testimony of a treating physician, when restricted to the fact of treatment rendered, and the dates and charges therefor, is not subject to the regulations of Local R. 21.[7] The Rule properly regulates expert opinion testimony as to permanency, future damages, diagnosis and prognosis.[8]

A review of Dr. Eppig's deposition testimony reveals that Dr. Eppig provided no testimony as to permanency, future damages, diagnosis and prognosis.

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[6] *Vaught v. Cleveland Clinic Found.* (Sept. 6, 2001), Cuyahoga App. No. 79026. See also *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 257-258; *Pang v. Minch* (1990), 53 Ohio St.3d 186, paragraph one of the syllabus; *Walworth v. BP Oil Co.* (1996), 112 Ohio App.3d 340, 352.

[7] *Zinsmeister v. Leamon* (May 2, 1985), Cuyahoga App. No. 49028.

[8] Id.

Dr. Eppig only testified about dates of and the treatment he rendered to Djukic. As such, Dr. Eppig was not testifying in an expert capacity. Consequently, we find that the trial court properly included the fact testimony of Dr. Eppig as it did not contravene the requirements of Local R. 21.1.

Djukic also argues that the trial court erred in permitting Dr. Eppig.'s testimony because his name was not furnished as a potential witness prior to trial. We are not persuaded.

A trial court may exclude the testimony of an undisclosed witness as a sanction, but the sanction is only appropriate when the failure to disclose the witness caused unfair surprise with the result and prejudice to the opposing party.[9]

In the instant case, Dr. Eppig was one of Djukic's treating physician relative to the alleged injuries sustained as a result of the collision. As such, Djukic was well aware of Dr. Eppig's existence, that he had relevant information; and that he could be called to testify. The record before us indicates that information relative to Dr. Eppig's treatment of Djukic was submitted as part of Djukic's List of Specials."[10] Consequently, there was no unfair surprise or prejudice as a result of Dr. Eppig's testimony.

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[9] *Maggard v. Villegas,* 5th Dist. No. 2006-CAE-06-0042, 2007-Ohio-1150, citing *Anderson v. Lorain County Title Company* (1993), 88 Ohio App.3d 367.

[10] Plaintiffs Exhibit 12.

Nonetheless, Djukic argues that on cross-examination during the deposition, Dr. Eppig refused to answer relevant questions, thus the trial court erred in admitting the testimony. We are not persuaded.

The following exchange took place during Dr. Eppig's deposition:

"Q. *, the records are there, Doctor. I've asked you to take a look at them.**

A. I know, but I haven't read them.

Q. Okay, but I'm asking you to look at them now.

A. I'm not going to judge other people's exams, histories, competence or impressions.

Q. Doctor, I don't know that you have that choice. I mean, I am entitled to show you a particular record that's introduced into the trial in this particular case and just ask you to comment on it. I'm not trying to criticize any other doctors. I just want to know whether anywhere in his admission to Parma Hospital he had in any way complained of any thoracic pain.

A. I have not been asked here to be an expert witness, to evaluate other people's care. I've been asked here to

> **report and reflect on my examination and my review of the information based on the three visits with the patient to me in my clinic. I was not then asked to be an expert witness. I was asked to provide medical information at that time in history."**[11]

A review of the above excerpt, and elsewhere in the record, reveals that Dr. Eppig was aware that he was being deposed as a fact witness and was not there to render any expert opinion. As previously noted, our review of the record indicates that Dr. Eppig only provided testimony regarding his treatment of Djukic. As such, we conclude on the record before us, the trial court did not abuse its discretion in overruling Djukic's motion in limine to exclude the testimony of Dr. Eppig. Accordingly, we overrule the first assigned error.

Judicial Notice

In the second assigned error, Djukic argues the trial court erred by not taking judicial notice of a certified copy of a journal entry showing that Turner's defense counsel had previously represented Dr. Eppig. We disagree

Pursuant to Evid.R. 201, a court may take judicial notice of adjudicative facts.[12] A judicially noticed fact

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[11] Eppig's Depo. at 44-45.

[12] *Concord Twp. Trs. v. Hazelwood Builders, Inc.*, 11thDist. No. 2004-L-012, 2005- Ohio-1791.

must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[13] A court may take judicial notice, whether requested or not, and must take judicial notice if requested by a party and supplied with the necessary information that would allow it to do so.[14] Additionally, a court may take judicial notice at any stage of the proceedings.[15]

In the instant case, Djukic asked the trial court to take judicial notice that Turner's defense counsel had previously represented Dr. Eppig. Djukic offered a certified copy of the journal entry as an exhibit. As gleaned from the record before us, the certified copy of the journal entry indicated that defense counsel had represented a Michael Eppig twenty-six years earlier. Thereafter, the following exchange took place:

> **"Mr. Kenneally: I have no memory of ever meeting a Dr. Eppig. I was a second- year attorney, associate attorney with a firm that's now defunct; Myers, Henteman, Schneider& Aronoff. It was probably a case that I had**

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[13] Evid.R. 201(B).

[14] *State v. Lahmann*, 12th Dist No. CA2006-03-058, 2007-Ohio—1795. See also Evid.R. 201(C) and (D).

[15] Evid.R. 20 1(F).

filed an answer and attended a pretrial and the case got resolved. I never met the man. I have no memory of that. How that could be relevant to the fact that he was called as a witness. Jack O'Donnell took his testimony. I wasn't the one examining him. How it could have any relevance to this case pales in my mind, your Honor, and absolutely there's an insinuation, if it is entered into evidence that I failed to disclose something without more -

The Court: But just so I'm clear, Dr. Eppig was a treating physician of the plaintiff, he was not a defense expert, was he?

Mr. Friedland: I didn't call him.

The Court: You didn't answer my question. Was he the treating physician?

Mr. Friedland: He testified he was a consulting physician. He's a treating physician.

The Court: **Who did - - your client went to see him, right?**

Mr. Friedland: **My client went to see him.**

The Court: **Then it's overruled. You made your record.**

Mr. Friedland: **So you're not allowing - -**

The Court: **I'm not going to allow you to introduce that exhibit.**

Mr. Friedland: **It's not Terry that I'm concerned about not remembering it. I'm concerned that Dr. Eppig who doesn't have thousands of automobile accidents, only maybe had a couple in his entire life, if any, more that one remembers Mr. Keannelly's name.**

The Court: **It's even less relevant because Mr. Kenneally isn't the one that deposed him. Jack O'Donnell deposed him."**[16]

We conclude, given the circumstances of the instant case, the trial court correctly refused to take judicial

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[16] Tr. At 272-273.

notice that defense counsel might have previously represented Dr. Eppig. The alleged representation took place twenty-six years ago, Djukic sought treatment from Dr. Eppig, defense counsel did not conduct the deposition, and Dr. Eppig testified as a fact witness. Consequently, the trial court did not abuse its discretion in not admitting the certified copy of the journal entry into evidence. Accordingly, we overrule the second assigned error.

Opinion Testimony

In the third assigned error, Djukic argues the trial court erred by not allowing Dr. Marsolais to render an opinion on the proximate cause of Djukic's injuries. We disagree.

As previously stated in the first assigned error, pursuant to Local R. 21.1(B), the report of an expert must reflect his opinions as to each issue on which the expert will testify. Thus, an expert will not be permitted to testify or provide opinions on issues not raised in his report.

In the instant case, the trial court did not permit Dr. Marsolais to offer opinion testimony as to the proximate cause of Djukic's injuries, because Dr. Marsolais' expert's report did not include any discussion on the issue of proximate cause. We conclude that the trial court adhered to Local R. 2 1.1(B). We also conclude that the trial court's decision was not prejudicial.

At trial, Dr. Marsolais testified as follows about Djukic's first appointment:

"Q. Can you tell the jury, give a little history about what Mr. Djukic told you when he came into your office on September 25th?

A. When I saw him on September 25th, he had chief complaints of pain from the upper waist to the base of the neck on both sides of his whole spine through here. And he told me that he had had no problem with his back, with his spine at all until he had been in a car accident where he was driving about 60 and was hit by somebody else driving a lot faster,. and there was enough energy in this interaction to give $6500 damage to Mr. Ujukic's car, which would mean there is a lot of energy involved. He said the car moved about 300 feet after the accident. He said he felt some right to left motion, too, with it, all of it primarily straight from behind. He said that he had noted pain in his neck, thoracic pain, spine, and felt some numbness in his face right away. He was taken to Parma Hospital. Was told to follow up with Dr. Vilinisky, was given a collar, felt worse the next day, was able to get in see Dr. Vilinisky about two weeks post the injury and then was told to see Mr. Miller. And it was his understanding that Dr. Miller had gotten an MRI of the brain and had sent him for therapy. Reason for the brain is because of the numbness in the

> **face to see if there might be something in the brain that's causing that. He felt that the therapy had helped a little bit, but didn't really bring him back to what he was before the accident."[17]**

A review of the above excerpt indicates that Dr. Marsolais, without specifically stating that the accident was the proximate cause of Djukic's injuries, provided sufficient information for the jury to infer the link between the accident and the injuries. Dr. Marsolais' testimony highlighted the nature of the accident and the pain Djukic complained of thereafter. Dr. Marsolais' testimony also indicated that Djukic revealed that the therapy he had received had not brought him back to the way he was before the accident.

Moreover, the jury's verdict in favor of Djukic, indicates that they did infer a causal connection between the accident and the injuries complained of. Consequently, Djukic suffered no prejudice from the trial court's ruling that Dr. Marsolais could not testify on the issue of proximate cause, because of his failure to address this issue in his expert's report. Accordingly, we overrule the third assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

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[17] Tr. At 223-224.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/_____
PATRICIA ANN BLACKMON, JUDGE

JAMES J. SWEENEY, P.J., and
MELODY J. STEWART, J., CONCUR

APPENDIX B

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
CASE NO. CV-504827

Verdict Punitive Damages (Plaintiff)

[See Fold-Out Exhibit, next page]

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

IVAN DJUKIC	)	CASE NO. CV 504827
	)	
	)	JUDGE PEGGY FOLEY JONES
Plaintiff,	)	
	)	
vs.	)	
	)	
	)	
MICHELLE TURNER, ET AL	)	
	)	VERDICT
	)	
Defendants.	)	PUNITIVE DAMAGES (PLAINTIFF)

We, the jury, being duly empanelled and sworn, upon the concurrence of the undersigned jurors being not less than three-fourth of the whole number thereof, do hereby find for the Plaintiff, Ivan Djukic,and against the Defendant, Michelle Turner, on the claim of punitive damages and award punitive damages in the amount of $ 0.

1. [signature]
2. [signature]
3. [signature]
4. [signature]
5. [signature]
6. [signature]
7. [signature]
8. [signature]

(Only those jurors agreeing with the verdict are to sign. Please sign on the line corresponding to your seat in the jury box)

APPENDIX C

THE SUPREME COURT OF OHIO

C.A. NO. 2007-1948

[Filed February 6, 2008]

IVAN DJUKIC Appellant	)
v.	)
MICHELLE TURNER Appellee	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Cuyahoga County Court of Appeals; No. 88849)

/s/_____
Thomas J. Moyer
Chief Justice

APPENDIX D

THE SUPREME COURT OF OHIO

C.A. NO. 2007-1948

[Filed April 9, 2008]

IVAN DJUKIC Appellant	)
v.	)
MICHELLE TURNER Appellee	)

ENTRY

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Cuyahoga County Court of Appeals; No. 88849)

/s/_____
Thomas J. Moyer
Chief Justice

APPENDIX E

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CASE NO. CV-504827

[Dated September 1, 2006]

IVAN DJUKIC	)
Plaintiff	)
	)
v.	)
	)
MICHELLE TURNER	)
Defendant	)
	)

PLAINTIFF'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

On Behalf of the Plaintiff:

By: DALE FRIEDLAND, ESQ,

On Behalf of the Defendant:

By: TERRENCE J. KENNEALLY, ESQ.

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[page 182]

FRIDAY MORNING SESSION,
SEPTEMBER 1, 2006

THE COURT: Let's go on the record.

- - -

(Thereupon, the following proceedings were held outside the presence of the jury as follows:)

THE COURT: We were in chambers this morning and were supposed to start the trial at 10:00. It came to my attention that about five minutes to 10:00 that. the defendant wanted to make an oral motion in limine to prohibit the next witness from testifying as an expert witness in giving testimony because the testimony about the proximate cause of the injury, the plaintiff's injuries were as a result of this accident, and the injury is permanent is not in his medical records. This witness has not produced an expert report pursuant to Local Rule 21. And the plaintiff in this case is relying on the medical records in his report in this case.

I've reviewed the medical records in this case and nowhere in the medical. records does it state that this doctor's opinion is that the injuries the plaintiff has sustained are the proximate result of this accident. Also, in this report there is nothing that says it's permanent.

Based on my review of the records I will allow these medical records to go in as an expert report pursuant to 21.2(c); however, I don't feel that its fair to the

defense, and I don't think it's proper to allow him to testify as to the proximate cause of the injuries because that opinion is not in the medical records. Local Rule 21.2(c) requires that the opinions still be in the medical records in order for the witness to testify as an expert to that effect.

Is there anything you want to say about your motion in limine?

MR. KENNEALLY: Just so I understand, your Honor, we're going to go forward with this witness.

THE COURT Put your objection on the record, I'm putting on what happened, what my
feelings - -

MR. KENNEALLY: Let me just clarify before I put my objection on. My understanding of your ruling is going to be that you're going to permit the witness to testify and you're going to permit the records to go into evidence, correct?

THE COURT: Right now, the only issue that I think this witness can testify about is that this person, plaintiff has a bulging disc is his injury. I'll allow him to say it's permanent based on the record but I don't think this witness can say it's a proximate cause of this accident because nowhere in there does it even talk about the accident.

MR. KENNEALLY: I will be satisfied, just so we can finish this case, with the witness being precluded from testifying that the accident was the proximate cause of this bulging disc.

MR. FRIEDLAND: If it please the Court, I have given the Court, the Court has not mentioned it, a letter this morning from Dr. Marsolais. The letter indicates that Mr. Djukic sustained a bulging and herniated disc as a result of this 7/16/01 accident, which certainly satisfies proximate cause. The doctor further puts down this is true within a reasonable degree of medical certainty. The doctor further puts down that this report had been requested by my office, and my office, incorrectly refused to discuss it with me.

So pursuant to the rules, I had made every effort to obtain the report, and that doctor's office messed up. I believe that within the spirit of the law, that there is surprise to Mr. Kenneally, he has used Dr. Marsolais's opinion in his deposition previously taken and put into court, and opened up obviously - -

THE COURT: Where has he done that?

MR. FRIEDLAND: You weren't at the medical depositions. He did it with Dr. Stearns, he talked about -- they talk about that he had agreed with Dr. Marsolais's opinion.

MR. KENNEALLY: Dale, Dale.

MR. FRIEDLAND: Let me finish.

THE COURT: What was the opinion?

MR. FRIEDLAND: We asked Dr. Stearns did he agree with the opinion that the defendant had a herniated disc directly and proximately related to the accident. He said he did not agree. We asked him do

you agree, and we read to him the opinions of Dr. Marsolais, of Dr. Ortega who I -- Dr. Ortega has already testified that it was directly and proximately- -

THE COURT: You got it through Dr. Ortega.

MR. FRIEDLAND: I do need to get through - -

THE COURT: You got that opinion from Dr. Ortega. You need it from this guy?

MR. FRIEDLAND: With all due respect, your Honor, I'm allowed to try my case. If I believe that there is a time line and different issues in the case, I am allowed to get in the proximate cause of the accident by as many witnesses as I desire. I believe that I have asked the Court to grant a short continuance to allow the Court to receive this. Dr. Marsolais had already been called. Dr. Marsolais has not been called to the stand yet, a letter on proximate cause has been given to the Court, and the Court is, I believe restricting my examination of the doctor. Justice would require her to allow it in.

MR. KENNEALLY: Can I say two things. First of all, number one, I never asked Dr. Stearns one question, or Jack didn't ask one question about Dr. Marsolais. This "we" that you keep hearing is on the cross examination. It was not on the direct examination. Dr. Marsolais's name was never mentioned in Dr. Eppig's deposition and most important - -

MR. FRIEDLAND: Yes, it was.

MR. KENNEALLY: Not by me. Not by my office and not by the defense in this case. And the other thing that really throws me in this case is that you allowed plaintiff's counsel - - this case was supposed to be resumed at 9:00 this morning. You allowed plaintiff's counsel an hour to get this guy here. He showed his disrespect for this Court by showing up at about 10:35, five minutes or ten minutes ago before, and he gives you this self—serving statement at this point in time, blaming it on his office that he hasn't got a report. And the report that was supposed to have been generated years ago.

MR. FRIEDLAND: In the first place, it's not self—serving, has nothing to do with Dr. Marsolais. It has to do with one of Dr. Marsolais's clients. In the second place, I had informed the Court that he would have trouble getting here.

THE COURT: I don't have a problem with him being late. I have a problem with this. I'm going to give my ruling on this. Im not going to allow him to testify to that. You can take it up with the Court of Appeals.

MR. FRIEDLAND: You're not going to allow me to have a continuance?

THE COURT: No, I'm not. It's the day of trial. The reason I'm not going to grant you a continuance, the purpose of the rule is that if this information had been in his medical records that it was the proximate cause, or if it was in his report, they may have taken the deposition on this client. You can't, the day of trial, right before the witness testifies come in, and all of a

sudden, he's going to give an expert opinion as to the proximate cause of damages in this case.

There is no prejudice to you because Dr. Ortega, you can argue through that witness, but I want the record to reflect why I'm not allowing this as to the proximate cause testimony Under Local Rule 21.2(c), let me just finish. You can put your -- any expert witness, if they're unable to obtain a written report, which Mr. Friedland has indicated he wasn't able to obtain the record from this witness, and that he was relying on the report, which I said is okay.

I believe he's shown that there was good faith effort, based on his conversation in chambers, he couldn't get the' doctor to bring a report, but the rule requires that he must advise the Court and opposing counsel of the name and address of the expert and the subject of the expert's testimony, together with his qualifications and a detailed summary of his testimony. That was not done in this case prior to trial.

In the event that the non-expert witness is a treating physician, the Court shall have the discretion to determine whether the hospital records will satisfy the requirements. I'm allowing that in but only what's in those records will be allowed to -- this witness to testify in the case. I'm basing this on the case that was just brought over by the head law clerk from Mike Heffernin. It is Eloyse Johnson versus Juanita Cave cited 1999, Ohio App, Lexis 289. And the situation was very analogous to this one where the doctor in this case, although it was the defense doctor, the plaintiff tried to prevent the defense doctor from testifying.

The doctor was reviewing - - was relying on his medical records also in this case.

However, in the medical records in this case, it stated that this was, quote, doubtful a causal relationship between the collision and the rotator cuff injury. In addition, the doctor supplemented the record with that opinion. The Court in this case found that the trial court could properly find that these disclosures were adequate and could discount the plaintiff's claims of surpise [sic], particularly because the plaintiff had canceled her scheduled examination with this doctor.

So I think that as long as the medical records have it, the doctor can do it but not in this case. So proffer if you want to make it, Dale.

MR. FRIEDLAND: Yes, I would certainly proffer the doctor's letter on proximate cause. I would once again indicate on the record that Mr. Kenneally had the opportunity to take the deposition of Dr. Marsolais, they did in fact subpoena Dr. Marsolais, they did in fact subpoena Dr. Marsolais to be their witness in the case. So there is no unfair surprise. They have known all along what Dr. Marsolais will testify to. They have reviewed all of his records, all of his MRIs, all of his CAT scans, all of the EMGs, I believe that he should be competent to testify and if we will bring forth - - not ask proximate cause questions but I will ask other questions as instructed by the Court.

THE COURT: All right.

MR. KENNEALLY: In response to that.

THE COURT: Mark it as a proffer exhibit and give it to the court reporter, attach it.

MR. FRIEDLAND: I will mark it Proffer 1.

THE COURT: These are your documents. I have the jury instructions here. They are done. I don't know if we'll get to them or not. We'll see.

MR. FRIEDLAND: Further indicate that a continuance was asked for and denied.

THE COURT: The continuance was asked for this morning. I don't think the continuance was asked for to get the letter or what was the continuance asked for so it's clear.

MR. FRIEDLAND: The continuance was asked for so that the letter, which was brought in prior to the start of court could be given.

THE COURT: Then I granted the continuance because I let you have the letter.

MR. FRIEDLAND: You didn't grant the continuance. You didn't grant the - -

THE COURT: What letter?

MR. FRIEDLAND: If you granted the continuance, I brought it in. I should be allowed to have him testify as to proximate cause.

THE COURT: Well, what was the continuance for?

MR. FRIEDLAND: I was asking for a continuance to give you a letter more specific on proximate cause to prevent any unfair surprise and allow the defense to have whatever time it needed to review that letter, to do whatever discovery that they would want with that letter, would then allow them to do so that there would be no error in this case whatsoever.

THE COURT: Okay. To continue the trial until next week is what you're saying to - -

MR. FRIEDLAND: For however long the defense needed if they believed that this was an unfair or undue surprise, which of course it isn't.

THE COURT: Mr. Kenneally, do you want to - -

MR. KENNEALLY: Just real quickly, I would object of course to any continuance of the trial. We're two witnesses away from finishing this case. This case is the second time around. It's a refiled case. It's an accident that happened in 2001, it begs for the fact that we're going to finish the case, the objection that I noted this morning, as the Court pointed out, there was an objection based upon 21(B) which requires that an expert report be submitted. None was ever submitted setting forth the doctor's opinions with respect to the injuries that were suffered in this accident, the proximate cause issues, and any permanency

APPENDIX F

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CASE NO. CV-504827

[Dated September 1, 2006]

IVAN DJUKIC Plaintiff	)
v.	)
MICHELLE TURNER Defendant	)

PLAINTIFF'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

On Behalf of the Plaintiff:

By: DALE FRIEDLAND, ESQ,

On Behalf of the Defendant:

By: TERRENCE J. KENNEALLY, ESQ.

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were held outside the presence of the jury as follows:)

- - -

THE COURT: I believe the plaintiff's going to rest.

MR. FRIEDLAND: I have one exhibit.

THE COURT: Which exhibit?

MR. FRIEDLAND: The exhibit of the court documents which indicated Mr. Kenneally was the attorney for Dr. Eppig.

MR. KENNEALLY: Well, unless you can prove to this Court that the Michael Eppig in 1980 that I filed an answer for and attended a pretrial, and who I never met is the Michael Eppig whose deposition - -

MR. FRIEDLAND: I will tell the Court that I went through the records at the county recorder's office, I did whatever due diligence I can and I found the Dr. Michael Eppig was at the same address as the person that was involved in this complaint. I'm only asking you to take judicial notice Mr. Kenneally was the lawyer. Maybe Terry doesn't remember the guy. Maybe Dr. Eppig remembers him, I don't know. I had no opportunity to find out about it until subsequent - - I just found out.

MR. KENNEALLY: It was 26 years ago. Think back when you were practicing law.

MR. FRIEDLAND: That's not the point.

MR. KENNEALLY: Listen to - -

THE COURT: The point you want to put in an exhibit that says - -

MR. FRIEDLAND: I want the Court to take judicial notice of the fact that Mr. Kenneally - - that there is a court case in which Mr. Kenneally was listed as the personal attorney for Dr. Michael Eppig, that's all.

THE COURT: We don't know if it's the same Michael.

MR. FRIEDLAND: I checked it as best I could. It's the same address where the doctor lived at that time according to the Cuyahoga County court recorder's office. I can't do any more, the doctor doesn't have to answer my questions. Mr. Kenneally I'm certain could call his insurance company, find out if it was him. He'd rather argue it's 26 years ago and he doesn't remember.

THE COURT: This is the relevancy of this is what?

MR. FRIEDLAND: Bias, prejudice of a witness.

THE COURT: Of what opinions?

MR. FRIEDLAND: That wasn't my witness. That was - -

THE COURT: Guys, stop arguing in front of me, just answer the question so I can move on. What is the relevance?

MR. FRIEDLAND: Dr. Eppig was a fact witness called by Mr. Kenneally. I didn't call him. And if he has a witness that he has represented before, I believe that it should have been noted to the Court. I don't doubt that Terry didn't remember. And I don't doubt that he had no recollection of it, but it is a fact.

THE COURT: Okay.

MR. FRIEDLAND: That's all. You can rule whichever way you want.

THE COURT: Terry.

MR. KENNEALLY: It's not relevant. It's totally not relevant. How am I supposed to remember, I handle six, 700 cases a year times 26 years.

MR. FRIEDLAND: I'm not saying - -

THE COURT: Don't interrupt, please. I want to go to lunch.

MR. KENNEALLY: I have no memory of ever meeting a Dr. Eppig. I was a second-year attorney, associate attorney with a firm that's now defunct; Myers, Hentemann, Schneider & Aronoff. It was probably a case that I had filed an answer and attended a pretrial and the case got resolved. I never met the man. I have no memory of that. How that could be relevant to the fact that he was called as a

witness. Jack O'Donnell took his testimony. I wasn't the one that was examining him. How it could have any relevance to this case pales in my mind, your Honor, and absolutely there's an insinuation, if it's entered into evidence, that I failed to disclose something without more - -

THE COURT: But just so I'm clear, Dr. Eppig was a treating physician of the plaintiff, he was not a defense expert, was he?

MR. FRIEDLAND: I didn't call him.

THE COURT: You didn't answer my question. Was he the treating physician?

MR. FRIEDLAND: He testified he was a consulting physician. He's a treating physician.

THE COURT: Who did -- your client went to see him, right?

MR. FRIEDLAND: My client went to see him.

THE COURT: Then it's overruled. You made your record.

MR. FRIEDLAND: So you're not allowing - -

THE COURT: I'm not going to allow you to introduce that exhibit.

MR. FRIEDLAND: It's not Terry that I'm concerned about not remembering it. I'm concerned that Dr. Eppig who doesn't have thousands of

automobile accidents, only maybe had a couple in his entire life, if any, more than one remembers Mr. Kenneally's name.

THE COURT: It's even less relevant because Mr. Kenneally isn't the one that deposed him. Jack O'Donnell deposed him.

MR. FRIEDLAND: Same office, it doesn't matter. His name is listed Terrence Kenneally & Associates. The record is made.

THE COURT: You can proffer your exhibit if you want the court reporter. And what else,

APPENDIX G

CUYAHOGA COUNTY, OHIO

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JUROR NO. 2: All eight.

THE COURT: Signed by all eight. The only unusual - - they signed the verdict form in favor of the plaintiff on the punitive but put in zero and not the defense one. So I just wanted to make sure you review it to make sure it's proper. Any objections?

MR. KENNEALLY: No.

MR. FRIEDLAND: No.

THE COURT: Ladies and gentlemen, on behalf of both the parties, I appreciate you staying late. I appreciate your service in this case. If you want to ask me any questions, you're welcome to after everybody leaves I'll talk to you. If you want to go home, I understand it's a holiday. Thank you very much. And have a - -

JUROR NO. 2: If I could make a statement, I would like to thank my fellow jurors. I think that they worked very deliberately and very honestly and it wasn't an easy situation. I admire all of them. I wish I could have met them under different circumstances. They're wonderful people.

(Thereupon, proceedings were adjourned.)